No. 09-1457

In the
Supreme Court of the United States

MARITIMAS MEXICANA, S.A. de C.V., aka MARMEX,
Petitioner,

v.

PERFORACIONES EXPLORACION Y PRODUCCIÓN, aka PROTEXA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) The Fifth Circuit applied the accepted and usual test as required by this Court and the United States Constitution in affirming the district courts' findings of admiralty subject matter jurisdiction under 28 U.S.C. § 1333(1), since this case involves both a maritime *situs* and a connection to a maritime activity. Petitioner's whim to add a third factor requiring factual findings of "discernable interests of the United States or its citizens" is superfluous since both personal jurisdiction and *forum non conveniens* already limit federal admiralty court access to foreign litigants.

2) The Fifth Circuit applied the usual and customary standard of review in affirming the denials of Petitioner's motion to dismiss based on *forum non conveniens* and motions to reconsider the motion to dismiss, since the district court judges did not abuse their discretion in considering the evidence presented, which favored a United States choice of forum. Therefore, supervisory authority should be denied.

PARTIES TO THE CASE AND RULE 29.6 STATEMENT

Respondents here and appellees below are Perforaciones Maritimas Mexicanas, S.A. de C.V. (Protexa Construcciones, S.A. de C.V. and Condux, S.A. de C.V. are the corporate parents) and Certain Reinsuring Underwriters Subscribing to Reinsurance Contract No. AHE-03044 as Amended to AHE-04004:

Navigators Insurance Services of Texas, Inc., which, in 2008 merged into Navigators Management Company, Inc. The surviving entity, Navigators Management Company, Inc., is owned 100% by The Navigators Group, Inc., which is publicly traded on the Nasdaq Global Select Market;

Hannover Re;

Axis Re Ltd, Dublin (Axis Capital Holdings Bermuda is the holding company),

Commonwealth Insurance Company;

Arch Insurance Company, a wholly-owned subsidiary of Arch Insurance Group Inc. (which is an indirect wholly-owned subsidiary of Arch Capital Group Ltd., a public holding company);

New York Marine & General Insurance Company (NY MAGIC INC. is the parent company);

St. Paul Fire and Marine Insurance Company;

ACE INA UK Limited; and

Compagnie de Reassurance d'ile de France

Petitioner here and appellant below is Maritimas Mexicanas, S.A. de C.V. Pursuant to Maritimas Mexicanas, S.A. de C.V's responses to Respondents' interrogatories, the corporate parents of Maritimas Mexicanas, S.A. de C.V. at the time of the allision in question were Seacor Marine Mexico, Inc. and Grupo TMM S.A.

Defendants below are Grupo TMM, S.A., Seacor Holdings, Inc. and Seacor Marine (Mexico), Inc.

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INTRODUCTION

Petitioner is appealing two Fifth Circuit opinions affirming the orders issued by two separate Texas district courts ("District Courts") regarding Marítimas Mexicanas S.A. de C.V.'s ("Petitioner" or "MarMex") motions to dismiss based on lack of subject matter jurisdiction and *forum non conveniens*. The Texas district court orders are: Judge Kent's July 21, 2006 denial of Petitioner's motion to dismiss, Judge Ellison's March 24, 2008 denial of Petitioner's motion to reconsider Judge Kent's order denying the motion to dismiss and Judge Ellison's April 25, 2008 denial of Petitioner's second motion to reconsider Judge Kent's order denying the motion to dismiss.

The reasons provided by Petitioner for seeking this Court's review are Petitioner's disregard for the Fifth Circuit's legal acumen and a generalized, paranoid hysteria that, unless the current law is changed, the United States district courts will be laid to waste by a flood of claims made by foreign entities. Notably, though unrelated to the case at bar, Petitioner's counsel have affirmatively represented to another court in the Southern District of Texas that there is admiralty subject matter jurisdiction over a collision that occurred in the territorial waters of China between foreign flagged vessels, owned by foreign companies.[1] Thus, the argument that there is no admiralty subject matter jurisdiction in this case

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[1] Verified Complaint, Prayer for Process and Relief by Maritime Attachment filed by Timothy Strickland in cause number 3:07-CV-00251, *Koninklijke Boskalis Westminster NV et al v. Mediterranean Shipping Company SA, et al.*

because of a lack of United States contacts is disingenuous and should not be countenanced.

By presenting this Court with arguments that are irrelevant to the test for admiralty subject matter jurisdiction, Petitioner attempts to obfuscate the obvious: a court has admiralty subject matter jurisdiction over an allision occurring on navigable waters. The Fifth Circuit did not break any new ground. Instead, it simply followed the two pronged *Grubart*[2] test for maritime jurisdiction, which has been mandated by this Court for fifteen years, without triggering any of the dire forum shopping consequences imagined by Petitioner. Accordingly, Petitioner has not presented any compelling legal reasons for its Petition for a Writ of Certiorari ("Petition") to be granted.

Specifically, Petitioner has utterly failed to demonstrate how the Fifth Circuit's opinions affirming the District Courts' denials of Petitioner's motion to dismiss and motions to reconsider the motion to dismiss: 1) are in conflict with a decision of any other court; 2) depart from the accepted and usual course of judicial proceedings; or, 3) sanction such a departure by a lower court. *See* Sup. Ct. R. 10. Moreover, the Petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court.

There is no case that holds that a link to the United States must be established as a condition for finding

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[2] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

admiralty jurisdiction, nor should there be. Contrary to Petitioner's argument, such a link is neither necessary nor required, since other defensive procedural mechanisms are already in place, that, if properly asserted, require a court to analyze the links a case has to the United States. A district court is tasked with acting as a gatekeeper when faced with motions to dismiss based on lack of personal jurisdiction, international comity or *forum non conveniens*.

If Petitioner's contacts were so tenuous and devoid of United States interests as to be unfairly hailed into a United States district court, Petitioner should have filed a motion to dismiss based on lack of personal jurisdiction. The district court would have considered the evidence and made the requisite factual findings regarding Petitioner's contacts with the United States. The outcome of such a motion will never be known because Petitioner failed to file such a motion.

Likewise, Petitioner failed to demonstrate to the District Courts how a trial in Mexico would be more convenient than in Texas. Voluminous evidence was presented to the District Courts demonstrating that MarMex was no stranger to the United States or its legal system. As the Fifth Circuit explained in its order denying Rehearing en Banc:

> [s]ince the allision occurred so shortly after the transfer of the ISLA AZTECA to MarMex, the vessel's crew had several ties to the United States. A U.S. citizen trained the captain of the ISLA AZTECA and was onboard the ship only six weeks before the allision and has since been assigned to work in Texas (...) After the allision,

> third parties operating out of the United States inspected the ISLA AZTECA and repaired the TOTONACA, and consequently many relevant invoices and records are in English. Indeed, before the trial for this case was bifurcated between liability and damages, MarMex's two designated witnesses concerning damages were residents of Texas. Furthermore, in the years since the allision occurred, the ISLA AZTECA has called on U.S. ports for repairs. Finally, MarMex itself has several links to the United States as well. In 2001, MarMex filed an admiralty lawsuit in the United States District Court for the Southern District of Texas, and its website currently states that it has 'administrative and operational centers' in Texas and Louisiana.[3]

Following the district court's initial denial of Petitioner's motion to dismiss, Petitioner sought to change the ruling no less than five times by filing an interlocutory appeal, two motions for reconsideration, a post judgment appeal and a Petition for Rehearing En Banc. Respondents, (the owner and insurers of the rig), objected to each challenge, presented the law and the facts and prevailed. Nonetheless, Petitioner continues to complain that the district and appellate courts got it wrong because it is dissatisfied with the results.

In order to achieve a different outcome, Petitioner now seeks to cavalierly overturn years of well-settled law by modifying the test for admiralty jurisdiction to

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[3] Petitioner's Appendix, pp. 122a-123a.

require a link to the United States or alternatively, requiring a *de novo* standard of review for a *forum non conveniens* motion. Thus, on its face, the Petition shows that the Fifth Circuit opinions do not conflict with any other court, or depart from the accepted and usual course of judicial proceedings or sanction such a departure by a lower court. Consequently, no review is warranted by this Court.

STATEMENT OF THE CASE

The Petition conveys the false impression that the Fifth Circuit committed error in upholding a finding of admiralty jurisdiction and in upholding the denial of the motion to dismiss based on *forum non conveniens* in a case with no United States interest whatsoever. Notably, Petitioner omits key factual details about its substantial connections and ties to the United States and also mischaracterizes the nature of the proceedings.

A. Factual Background

On May 31, 2004, the M/V ISLA AZTECA ("AZTECA" or "the vessel") owned by Petitioner hit the Mobile Offshore Drilling Unit, MODU TOTONACA ("TOTONACA" or "the rig") approximately 45 miles off the coast of Mexico.[4] The allision occurred because the improperly trained Chief Mate onboard the AZTECA failed to disengage the vessel from autopilot.[5] As a

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[4] OR USCA5 1212 ¶ 72. All designations of the original record, first supplement of the record and second supplement of the record are designated as "OR" "1S" and "2S."

[5] 1S USCA5 1663, 2340, 5216 and 5822.

result of the allision, the owner of the rig, Perforaciones Marítimas Mexicanas, S.A. de C.V. ("PMM"), incurred more than $5M in damages.[6]

Almost immediately following the allision, Petitioner and its insurers retained Houston, Texas resident Carey Aikin[7] to investigate the accident, report on the damages and adjust Petitioner's claims.[8] Petitioner also retained Houston, Texas counsel, Fowler Rodriguez, within days after the allision.[9] Texas counsel was present when the AZTECA was inspected[10] five days after the incident.

Following the allision, United States residents investigated the vessel's navigation system. Kongsberg, a company based in Louisiana, investigated the AZTECA's control switching.[11] Rolls-Royce, the company that performed an inspection of the AZTECA's aqua pilot controls, is also based in Louisiana.[12]

Repairs to the AZTECA relating to the allision were conducted at Bollinger Shipyard in Louisiana in June

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[6] OR USCA5 1883.

[7] 1S USCA5 1663.

[8] OR USCA5 1398; OR 1899; OR USCA5 2812; 1S 1662; 1S USCA5 2342.

[9] 1S 1662-3.

[10] 1S USCA5 1663.

[11] OR USCA5 1894-96 1S USCA5 1663; 1S USCA5 9695-96.

[12] OR USCA5 1398, OR 1897-903; 1S USCA5 1663.

2006.[13] The Houston, Texas branch of the American Bureau of Shipping ("A.B.S.") inspected the AZTECA following the allision.[14]

The reports relating to Bollinger Shipyard's repairs to the AZTECA are in English.[15] The inspection reports prepared by Mr. Aikin, Kongsberg, Rolls Royce and the A.B.S. are all in English.[16] The manual detailing the dynamic positioning system is in English.[17]

The repairs to the TOTONACA were conducted by Beacon Maritime, a corporation based in Orange, Texas.[18] The engineering expertise for the repairs was provided by Bennett and Associates, a company based in Louisiana.[19] Beacon Maritime's and Bennett and Associates' invoices and reports are all in English.[20]

PMM's lead underwriter, Navigators Insurance Services of Texas, Inc. ("Navigators"), a Plaintiff in the suit, is a Texas corporation with its principal place of

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[13] OR 1879-1903; notably, the repairs were occurring in the United States while MarMex was arguing that the United States was an inconvenient forum. 1S USCA5 51; 1S USCA5 95-96.

[14] 1S USCA5 2645; 1S USCA5 328-32; 1S USCA5 2342.

[15] OR USCA5 54-55; 1S USCA5 2486-2500.

[16] OR USCA5 1894 96; OR 2782; OR USCA5 1897-99; OR 1899-903; 1S USCA5 2465; 1S USCA5 2475-82, and 1S USCA5 322-33.

[17] 1S USCA5 2587-2610.

[18] 1S USCA5 1805-11; 1S USCA5 1663.

[19] OR USCA5 1783; 1S USCA5 1663.

[20] 1S USCA5 1731-45; 1S USCA5 2422-24.

business in Houston, Texas.[21] Navigators' file, containing the proofs of loss and demonstrating payment for the loss, is in English.[22] James Moore, the adjuster and surveyor for the TOTONACA, reviewed all of the invoices related to the allision and prepared reports detailing all of the costs incurred.[23] Mr. Moore resides in Dickenson, Texas and works for J.F. Moore in Houston, Texas.[24] Mr. Moore's invoices and reports are in English.[25]

Seacor Marine Mexico ("Seacor"), a United States company based in Louisiana,[26] owned 40% of MarMex at the time of the allision.[27] As a result of Seacor's ownership interest in MarMex, many relevant facts to this case are rooted in the United States.[28] Just four months before the allision, Seacor transferred the vessel to MarMex under a synthetic lease and MarMex changed the registration of the AZTECA from an American to a Mexican flag. An American captain, who trained in Houston, Texas, trained the captain of the AZTECA[29] and was still on board just six weeks

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[21] OR USCA5 1401, OR 1223, 1483-4.

[22] OR USCA5 57-197.

[23] OR USCA5 1325, OR USCA5 1398, OR USCA5 1783, 1S USCA5 1663.

[24] OR USCA5 183, and USCA5 1223; OR 2089; 1S USCA5 1663.

[25] OR USCA5 1325-33, 1S USCA5 2425.

[26] 1S USCA5 2341.

[27] 1S USCA5 95; OR USCA5 1385-6, OR USCA5 1456; OR USCA5 2905 ¶ 19-24; OR USCA5 1816.

[28] USCA5 1483-84.

[29] OR USCA5 1880

before the allision.[30] The Captain of the AZTECA, who was onboard when the allision occurred, trained in Houston, Texas.[31] Seacor provided the English training manuals onboard the AZTECA.[32] Seacor executives were immediately notified via email of the accident,[33] and Seacor conducted an investigation into the allision and recommended that American captains return onboard.[34] Michael Kneeland, the general manager of MarMex who testified for Petitioner at trial, is a United States citizen and owns a home in Houston, Texas.[35]

At the time Petitioner filed its motion to dismiss, the Chief Mate, who was at the helm of the AZTECA when the allision occurred, was employed by an American company in the State of Louisiana and was assigned to work in Port Arthur, Texas.[36] Mr. Aiken and Mr. Perkin, who Petitioner designated as witnesses regarding damages, reside in Texas.[37]

Petitioner has numerous and significant links to the United States. It has held shareholder meetings in Houston, Texas.[38] Petitioner's own website indicates

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[30] OR USCA5 1893; 1S USCA5 1665; 1S USCA5 2461.

[31] OR USCA5 1880.

[32] OR 1484; OR 1377.

[33] 1S USCA5 2361.

[34] OR USCA5 1793; 1S USCA5 1665.

[35] 1S USCA5 1664.

[36] OR USCA5 51; 1S USCA5 1664.

[37] 1S USCA5 3229-30; 1S USCA5 3292.

[38] OR USCA5 1819; 1S USCA5 1664.

that it has "administrative and operational centers located in (...) the U.S. (Houston, TX and Morgan City, LA)."[39] Petitioner operated vessels with American masters and chief engineers.[40] Petitioner regularly uses dry docks in Texas and Louisiana[41] and has United States bank accounts.[42] In 2001, Petitioner filed an admiralty lawsuit in the Southern District of Texas, Houston Division.[43]

B. Procedural Background

Following the allision, MarMex filed a limitation of liability action in the Sixth District Court of Mexico pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims ("the 1976 Convention").[44] Contrary to Petitioner's pronouncement, the limitation of liability action is not a lawsuit. In fact, Petitioner has previously judicially admitted that the Ex Parte Proceeding did not provide a forum in which the underlying liability of the vessel could be determined.[45] On October 27, 2004, an order was entered allowing MarMex to establish a limitation fund. Pursuant to the order, MarMex posted bond

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[39] 1S USCA5 1662.

[40] OR USCA5 1484; 1S USCA5 1666.

[41] 1S USCA5 1663.

[42] 1S USCA5 1663.

[43] 1S USCA5 1662.

[44] OR USCA5 609-621 (text of limitation); OR USCA5 1416-22; OR 1377-38; 1S USCA5 96.

[45] OR USCA5 1379; OR USCA5 1416; 1S USCA5 96-97.

with the court in the amount of $427,460.97.[46] Respondents have not made a claim on that fund.[47]

On July 28, 2005, Respondents filed suit in the Southern District of Texas against MarMex, Grupo TMM and Seacor Holdings, Inc., the supposed owners and operators of the AZTECA.[48] Petitioner appeared, did not contest personal jurisdiction and denied any liability for the allision.[49] Respondents filed an amended complaint, on July 14, 2006, adding Seacor Marine (Mexico), Inc. as a defendant.

On July 21, 2006, Judge Kent denied Petitioner's motion to dismiss based on *forum non conveniens*, principles of international comity and lack of subject matter jurisdiction.[50] In the same order, Seacor Holdings, Inc. and Seacor Marine (Mexico), Inc. were dismissed from the lawsuit. On May 10, 2007, Judge Kent found that Mexican substantive law would apply to the dispute but that the 1976 Convention would not apply, since it is Mexican procedural law.[51]

This case was subsequently transferred to Judge Ellison's docket in October 2007.[52] MarMex filed a motion to reconsider the order denying its motion to dismiss. Judge Ellison considered and denied the

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[46] OR USCA5 1253; OR 1378 1-79.

[47] OR USCA5 2906 ¶ 3-10.

[48] OR USCA5 15; 1S USCA5 1662 (Grupo TMM).

[49] OR USCA5 207 to 218

[50] OR USCA5 1145.

[51] 1S USCA5 704-719, 2344, 2655 and 2674.

[52] 1S USCA5 1235-6.

motion. Specifically, Judge Ellison held that the predecessor court did not commit a manifest error of law "when determining that subject matter jurisdiction was appropriate based on relevant United States case law."[53] Likewise, when reconsidering the *forum non conveniens* issue, the district court noted "[T]he Predecessor Court's decision on these matters was discretionary, however, and Defendants do not argue that the court applied an incorrect legal standard. Thus, it is difficult for this Court to find that the Predecessor Court clearly committed a manifest error of law. Furthermore, it appears that some of the factors that may have weighed in favor of dismissal eighteen months ago may now tilt the other direction."[54] On April 25, 2008, MarMex filed a second motion to reconsider its motion to dismiss which Judge Ellison denied on April 29, 2008.

That same day, the parties submitted their trial exhibit lists and objections and exchanged all trial exhibits.[55] Respondents' exhibit list included all invoices to support their damage claim related to the repairs.[56] Trial was anticipated to take no longer than three days.[57] Petitioner's counsel represented to the trial court that she envisioned "the bulk of our case is going to be done through cross-examination regarding the damages."[58] On an oral motion during an April 25,

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[53] Petitioner's Appendix, p. 63a.

[54] Petitioner's Appendix, p. 65a.

[55] 1S USCA 53253, 1S USCA5 3322, 1S USCA5 3308.

[56] 1S 3253-86.

[57] 2S USCA5, ll. 23 24.

[58] 2S USCA5 5341, ll. 18-20.

2008 pre-trial conference with the court, Petitioner requested the trial to be bifurcated.[59] Just six days before the May 5, 2008 trial setting, the district court ruled to bifurcate the liability and damage phases of trial.[60] The liability phase of trial was conducted on May 5 and 6, 2008. The damages witnesses designated by Petitioner prior to the bifurcation were: Carey Aiken and Gregg Perkin who are based in Houston and Kingwood, Texas.[61]

On September 2, 2008, Petitioner was found liable to Respondents under Article 1913 of the Mexican Civil Code for causing damage to the TOTONACA, but Grupo TMM was not.

After trial, Petitioner appealed to the Fifth Circuit for review of Judge Kent's denial of its motion to dismiss and the denial of MarMex's motion to apply the 1976 Convention, along with Judge Ellison's denials of Petitioner's motions to reconsider the motion to dismiss. After oral argument, the Fifth Circuit denied Petitioner's appeal on December 9, 2009 and remanded the case for trial on the damages. Petitioner then filed a Petition for Rehearing En Banc which was denied on February 17, 2010.

REASONS FOR DENYING THE PETITION

The Fifth Circuit applied the accepted and usual standard of review and legal analysis for admiralty subject matter jurisdiction and the doctrine of *forum*

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[59] 2S USCA5 5342.

[60] 1S USCA5 1330, 1S 3253 and 1S 3295.

[61] 2S USCA5 3308.

non conveniens. Since the Fifth Circuit's opinions are entirely correct and proper, Petitioner cannot identify any conflict between that decision and the decision of any other appellate courts. Furthermore, Petitioner did not provide any rational legal reasoning to justify departing from years of sound legal precedent except to garner a different outcome. Accordingly, the Petition should be denied.

I. The Fifth Circuit's Decision Finding Admiralty Jurisdiction for an Allision Does not Conflict With the Decisions of this Court or any Other Appellate Courts Because a Vessel Hit a Rig in Navigable Waters

In determining whether admiralty jurisdiction exists, the Fifth Circuit relied on the two pronged test outlined by this Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). The Fifth Circuit affirmed that both conditions of location and connection with a maritime activity were satisfied in this case: the tort involved an allision of a vessel with a rig on navigable waters.

As mandated by this Court, all district courts in all circuits find that the analysis into the existence of admiralty subject matter jurisdiction is dependent only on a maritime *situs* and a connection to maritime activity and not on whether there are discernable interests of the United States involved in the case. In this instance, the allision satisfies conditions of both location and connection with a maritime activity.

The condition of maritime *situs* is met because the allision occurred on navigable waters. It occurred seaward of the territorial sea, approximately 45 miles

off the coast of Mexico.[62] Petitioner has judicially admitted that the allision occurred in an "area of deep sea subject to a legal regime known as "exclusive economic zone."[63] Thus, by Petitioner's own admission, the allision occurred on navigable waters and Petitioner cannot now argue otherwise.

Petitioner never argued to the Fifth Circuit that there was no connection to a maritime activity since the tort involved a vessel alliding with a rig. To the extent that Petitioner now seems to be contesting whether there is a connection to a maritime activity, it is undisputed that allision cases are an important and integral part of maritime law and are clearly encompassed within the concept of maritime activities. Admiralty Jurisdiction: Maritime Nature of Tort-Modern Cases, 80 A.L.R. Fed. 105 § 3(c); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

Any analysis into contacts with the United States is clearly not a part of this Court's mandated two pronged test for subject matter jurisdiction. *See e.g. Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, 436 F.3d 349 (3d Cir. 2006) (distinguishing admiralty jurisdiction from *forum non conveniens* and personal jurisdiction); *Sosa v. M/V Lago Izabal*, 736 F.2d 1028, 1031 (5th Cir. 1984) (distinguishing admiralty subject matter jurisdiction and choice of law), *Sang Young Kim v. Frank Mohn A/S*, 909 F. Supp. 474 (S.D. Tex. 1995) (distinguishing admiralty subject matter jurisdiction analysis from personal jurisdiction). While no case has addressed the narrow

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[62] OR USCA5 1212 ¶ 72.

[63] OR 1382-1383 (emphasis added).

and specific fact scenario presented by this case (nor would two admiralty cases ever share the same facts given the breadth of potential occurrences that could arise on any given day), this Court has previously found admiralty jurisdiction for torts: 1) between foreigners, 2) occurring in foreign waters; and, 3) relating to purely foreign matters. *See e.g. Langnes v. Green*, 282 U.S. 531, 543 (1931) ("Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners"); *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U.S. 515, 517 (1930) ("The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court"); *Canada Malting Co. v. Patterson S.S.*, 285 U.S. 413, 418 (1932) ("The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction, and that the exercise of its discretion will not be disturbed unless abused"); *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 285 (1897) ("The fact that the cause of action arose in the waters of a foreign port is immaterial ... the law is entirely well settled both in England and in this country that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.")

In *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), this Court did not alter the opinion of the panel of the Third Circuit Court of Appeals when it determined that there was admiralty jurisdiction under 28 U.S.C. § 1333(1). Notably, "no significant interests of the United States were involved." *Id.* at 428. "[T]he nub of the controversy was entirely foreign: The dispute centered on the arrest of a foreign ship in foreign

waters pursuant to the order of a foreign court." *Id.* Clearly, admiralty subject matter jurisdiction is not contingent on the outcome of an inquiry into whether interests of the United States are involved.

Appellate courts and legal scholars also agree that admiralty jurisdiction extends to torts occurring in foreign waters, between foreigners and relating to foreign matters. For example, in *The Kanto Maru,* 112 F.2d 564 (9th Cir. 1940), admiralty jurisdiction existed (but was declined) even though the collision occurred in the territorial waters of Japan, no Americans were involved, Japanese law would control the decision and all witnesses were in Japan. More recently, in *Rodriguez v. Transnave Inc.*, 8 F.3d 284 (5th Cir. 1993), neither the parties nor the appellate court ever questioned the existence of general maritime jurisdiction in a suit that involved an Ecuadorian plaintiff, an Ecuadorian defendant and an accident that occurred on an Ecuadorian-flagged vessel in international waters witnessed only by sailors who also resided in Ecuador. *See also e.g. Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) ("...the admiralty jurisdiction of United States courts is not limited by the nationality of ships, sailors or seas involved"); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 311 (5th Cir. 1987), reh'g denied, 823 F.2d 552, rev'd on other grounds, 486 U.S. 140 (1988) (there was "undoubted admiralty jurisdiction" over claims made by a Singapore plaintiff for an alleged tort that occurred in Singapore waters and governed by the substantive law of Singapore); *Sevison v. Cruise Ship Tours, Inc.*, No. 1996-57, 1997 WL 530267, 6 (D. Virgin Islands Aug. 15, 1997) (stating that the foreign nature of the waters is relevant to the determination of the

appropriate choice of law rather than a determination of whether admiralty jurisdiction exists); Grant Gilmore and Charles Black, Jr., *The Law of Admiralty* § 1-19, at 51-2 (2d Ed. 1975) ("[t]he courts of the United States take jurisdiction, subject to some reservation imposed by their own application of the doctrine of *forum non conveniens*, of suits on maritime claims arising out of transactions and occurrences anywhere in the world" (footnotes omitted)).

Although Petitioner desperately seeks to factually distinguish this case from every case finding admiralty subject matter jurisdiction, Petitioner cannot legitimately dispute that the only facts necessary for a finding of maritime *situs* and maritime activity are present in this case. Petitioner did not contest personal jurisdiction below, presumably because of its numerous discernable connections and interests to the United States, as was borne out in the several hearings that were held on Petitioner's motion to dismiss based on *forum non conveniens* and motions to reconsider the motion to dismiss. Petitioner is now seeking to contort and distort the test for subject matter jurisdiction in an effort to untimely and improperly challenge personal jurisdiction. In view of the current and well established law, this Court should affirm the Fifth Circuit's finding that admiralty jurisdiction exists in this case.

II. The Petition Fails to Establish an Important Question of Federal Law That Should be Resolved by This Court Because Procedural Mechanisms Already Exist That Limit a Foreign Litigant's Access to American Courts For a Claim With no Interests of the United States or its Citizenry

This Court's two pronged *Grubart*[64] test has been on the books for fifteen years and has not caused the untoward "flocking" of foreign entities to American courts. Thus, the crux of Petitioner's plea for the need to review and overhaul the current law has not come to pass. Furthermore, in a case between foreign litigants that truly have no connection to the United States, a court would find it lacks personal jurisdiction over the defendant or decline jurisdiction based on *forum non conveniens* or international comity, if such motions were properly pleaded and factually supported by the foreign party. There is simply no reason for this Court to alter years of sound legal precedent in order to appease one disgruntled litigant.

III. Alternatively, Admiralty Jurisdiction Would Exist Even if Petitioner's "Test" For Admiralty Jurisdiction Required an Analysis into United States Interests

The facts of this case provide a poor vehicle for altering the well established test for admiralty subject matter jurisdiction. Petitioner complains that this allision involves "no discernible interests in the United States." To the contrary, American captains trained

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[64] *Jerome B. Grubart, Inc.*, 513 U.S. at 534.

the crew of the AZTECA and were directed to return to the vessel following the allision. American citizens inspected the navigation system following the allision. An American company provided the engineering expertise necessary to repair the rig. An American company provided an American crew to repair the rig. American citizens inspected the vessel within days after the accident occurred, and American citizens adjusted the claim and were designated as damages witnesses by Petitioner and Respondents. Therefore, even if the current test for admiralty jurisdiction were altered to include an analysis of United States interests, a court would find that in this case, there was sufficient "discernable interests of the United States or its citizens" to justify a finding of the existence of admiralty subject matter jurisdiction.

IV. The Petition Should be Denied Because the Fifth Circuit's *Forum Non Conveniens* Analysis is Consistent With That of Other Appellate Courts

The Fifth Circuit properly applied the settled standards under which all the appellate courts review a district court's ruling on a motion to dismiss for *forum non conveniens*. The Fifth Circuit affirmed that Judge Kent correctly and properly applied the factors set forth in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947) and affirmed that Judge Ellison properly considered new evidence offered in response to Petitioner's motions for reconsideration to determine that the United States is a convenient forum for this dispute.

1. Based on the Evidence Presented, the District Courts Correctly Found that the United States is a Convenient Forum

Based on the overwhelming evidence presented to the District Courts, Petitioner could not establish that the *forum non conveniens* factors favored dismissal of this action. The defendant has the burden of persuasion in proving all elements necessary for the court to dismiss a claim based on *forum non conveniens*. *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir.1988); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1164 (5th Cir. 1987) (en banc), partially vacated on other grounds, 490 U.S. 1032 (1989). Trial courts have broad discretion in deciding a motion to dismiss based on *forum non conveniens*, and when the district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

a. The Private Factors Favor Maintaining the Action in the Texas District Court

Private interest factors include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses and all other practical problems that make trial of a case easy, expeditious and inexpensive. *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001).

In determining that the private factors did not compel dismissal, Judge Kent was presented with and considered the following:

- Most of the material and relevant documents that were in Spanish had already been translated (Respondents presented the court with an index of all the documents that had already been translated).[65]

- Petitioner was working with counsel who speak and read in Spanish and English.[66]

- Any additional documents could be scanned, emailed, faxed and/or overnight-expressed.[67]

- Petitioner never identified the supposed key Mexican witnesses to be called or the substance of their testimony.[68] Instead, it merely made a general allegation that Mexican witnesses were necessary.[69]

- The majority of witnesses identified in Petitioner's Rule 26 disclosures, thus suggesting they may desire to call them as trial witnesses, were accessible and amenable to the court's

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[65] OR USCA5 1395-96.

[66] OR USCA5 1396; 28 USCA5 5592.

[67] OR USCA5 1396.

[68] OR USCA5 1397.

[69] OR USCA5 1397.

jurisdiction at the time Petitioner filed its motion.[70]

- Key witnesses were amenable to jurisdiction in Texas and most of the witnesses in the case were within the employ of the parties, therefore their attendance at trial could be compelled.

- Respondents and their witnesses were all agreeable to appear in the United States forum.[71]

- Seacor, the 40% interest owner in MarMex at the time of the allision, is a Louisiana corporation.[72]

- Seacor personnel trained MarMex officers, Seacor personnel sailed on MarMex vessels and MarMex personnel were assigned to serve on Seacor vessels.[73]

- The Captain, the Chief Mate, the Chief Engineer and the First Engineer all worked hitches on Seacor vessels (which docked in the United States), while employed by MarMex.[74]

- The distance between the location of the vessels involved in this allision is equally inconvenient

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[70] OR USCA5 1398.

[71] OR USCA5 1398; 1S USCA5 691.

[72] OR USCA5 1398.

[73] OR USCA5 1880 and 2028

[74] OR USCA5 1880

whether this matter were tried in Mexico or Galveston. PMM's headquarters are in Monterrey, Mexico and MarMex's and Grupo TMM's headquarters are in Mexico City. The distance from Campeche, Mexico, where the allision occurred, to Galveston is 706 miles. The distance from Campeche to Mexico City, where MarMex claimed to have a pending limitation, is 563 miles.[75]

- A year and a half had passed from the time of the incident to the date of Petitioner's motion to dismiss based on *forum non conveniens*.[76] Trial of this matter was set for three months after Petitioner filed its motion. There would have been significant delay if the case were dismissed and re-filed in Mexico.

- In their answers to the original complaint, none of the Mexican parties raised the issue of personal jurisdiction.[77]

- Grupo TMM, the other Mexican defendant, was not a stranger to courts of the United States.[78]

Judge Ellison, upon reconsidering Judge Kent's order, was presented with the following additional evidence discovered after MarMex was compelled, on

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[75] OR USCA5 1399.

[76] OR USCA5 1399.

[77] OR USCA5 1390.

[78] OR USCA5 1392.

multiple occasions,[79] to produce documents and corporate representatives for deposition:

- Petitioner has held shareholder meetings in Houston.[80]

- Michael Kneeland, Petitioner's general manager, is a United States citizen and owns a house in Houston.[81]

- Petitioner found the Southern District of Texas a convenient forum when it filed an admiralty lawsuit in 2001 in the Houston division of the Southern District of Texas. Petitioner has also filed lawsuits in New York.[82]

- Petitioner agreed to waive any arguments that the United States was an inconvenient forum in its contracts relating to the sale of the AZTECA.[83]

- Petitioner hired American counsel, Fowler Rodriguez, immediately after the allision, on April 5, 2004, more than one year before Respondents filed this case in the Southern District of Texas. A partner at Fowler

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[79] OR USCA5 1829-45; OR USCA5 2781-85; OR 2807-10; OR 2867; 1S 439-48; 1S 972; 1S 1028; 1S USCA5 1163; 1S USCA5 1233; 1S USCA5 1267; 1S USCA5 1660; 1S USCA5 1878.

[80] 1S USCA5 2360.

[81] 1S USCA5 2360.

[82] 1S USCA5 2359.

[83] 1S USCA5 2359.

Rodriguez's office was present when the AZTECA was inspected on April 5, 2004.[84]

- Petitioner has bank accounts in the United States that it uses to pay its providers.[85]

- Petitioner's own website indicates it has administrative and operational centers in Houston, Texas and Morgan City, Louisiana.[86]

- Carey Aikin, Petitioner's surveyor who inspected the damage to the AZTECA shortly following the allision is based in Houston and became involved in this case a day or two after the allision occurred.[87]

- The AZTECA was sent for repairs related to the allision in the United States, either in Texas or Louisiana.[88]

- Petitioner continues to use drydocks in Louisiana and Texas. Each time Petitioner uses a drydock in Houston, the crew remains in Houston for approximately 30 days. Petitioner flies a supervisor from its offices in Mexico to Houston to supervise the work.[89]

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[84] 1S USCA5 2359.

[85] 1S USCA5 2360.

[86] 1S USCA5 2360.

[87] 1S USCA5 2360.

[88] 1S USCA5 2360.

[89] 1S USCA5 2360.

- Petitioner has since merged with Grupo TMM; Grupo TMM has contracts under which its vessels currently call, on a regular basis, to ports in Houston and Galveston, Texas.[90]

- When the AZTECA's Chief Mate, who was on watch at the time of the allision, was deposed in July, 2006, he was working for a North American Company based in Louisiana and was assigned to work on a vessel stationed in Port Arthur, Texas and was, in fact, leaving for Port Arthur after the deposition.[91]

- Captain Solano, the captain of the AZTECA when the allision occurred, attended a 5 day training course in Houston.[92]

- Luis Ocejo, the corporate representative offered by Petitioner, regularly travels to the United States for business. He is fluent in English and was recently elected to the Board of the A.B.S. in Houston.[93]

- Carlos Lopez, the corporate representative offered by MarMex, is fluent in English. He testified that he has traveled to the United States to attend conferences, meet ship brokers and to attend meetings in shipyards.[94]

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[90] 1S USCA5 2360.

[91] 1S USCA5 2360.

[92] 1S USCA5 2361.

[93] 1S USCA5 2361.

[94] 1S USCA5 2361.

The only private factor that weighed slightly in favor of a Mexican adjudication was the cost of obtaining testimony of both willing and unwilling witness. Respondents, however, volunteered to produce corporate witnesses for depositions in the United States at Respondents' expense.[95]

Petitioner engages in revisionist history to fault the District Courts for failing to consider arguments that it did not timely present. Petitioner's motion to dismiss based on *forum non conveniens* did not argue that seven of the "key witnesses" were no longer employed by PMM. Notably, the first time Petitioner raised such an argument was in its Petition for Rehearing en Banc to the Fifth Circuit and by that time, it was untimely. Significantly, when the district court considered the motion to dismiss based on *forum non conveniens*, many witnesses were still within the employ of PMM and thus available for deposition.[96] Another argument Petitioner currently raises, but did not present to the district court in its motion to dismiss based on *forum non conveniens* is that it never received the returns of the letters rogatory. However, at the time that Judge Kent was considering the motion to dismiss, Petitioner had not filed requests for letters rogatory. Any argument that MarMex is prejudiced by the lack of response to letters rogatory rings hollow given that MarMex waited until three and a half years following the date suit was filed to issue them.

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[95] OR USCA5 1397.

[96] OR USCA5 1398.

Finally, Petitioner improperly attempts to bolster its claim that the United States is an inconvenient forum for the damages portion of the trial by offering yet another new argument and general statement that the damages trial will be based on the testimony of "Mexican residents and Mexican shipyard documents." To the contrary, Petitioner designated Texas residents, Mr. Aiken and Mr. Perkin, as damages witnesses and informed the court that "the bulk of our case is going to be done through cross-examination regarding the damages."[97]

In view of the private factors that were actually presented to the District Courts for their consideration, it was not an abuse of discretion for the District Courts to refuse to dismiss the case based on *forum non conveniens*. Therefore, the Petition should be denied.

b. The Public Factors Favor Maintaining the Action in the Texas District Court

In determining that the public factors do not compel dismissal, the District Courts considered the following:

- At the time MarMex filed its motion to dismiss based on *forum non conveniens*, the case was scheduled for trial in less than three months – dismissal would have resulted in substantial delay.[98]

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[97] 2S USCA5 5341, ll. 18-20.

[98] OR USCA5 1400.

- Respondent's lead underwriter is a Texas citizen, with its principal place of business in Houston, Texas.[99]

- MarMex had indicated its willingness to litigate the issue under a law other than Mexican law by filing a limitation of liability pursuant to the 1976 Convention, which is considered international law in Mexico.[100]

- MarMex did not file its notice to apply Mexican law before filing its motion to dismiss. In the motion to dismiss, Petitioner only generally indicated that Mexican law would apply.[101]

- No jury is required for an admiralty allision case.[102]

- There was a local interest in having localized controversies decided in Texas because Seacor had, at the time of the allision, a 40% ownership in MarMex and conducted regular business in Texas.[103] Seacor exercised significant control over the AZTECA: Seacor executives were notified immediately after the allision occurred;[104] Seacor board members had 50%

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[99] OR USCA5 1401.

[100] OR USCA5 1401.

[101] OR USCA5 1401.

[102] OR USCA5 1402.

[103] OR USCA5 1400.

[104] 1S USCA5 2361.

control in all decisions regarding MarMex;[105] Seacor executives often flew to Mexico to conduct operational discussions with MarMex;[106] MarMex vessels operated with crew employed by Seacor.[107]

- The complaint only alleged causes of action arising under general maritime law of the United States.

Since Petitioner failed to show that a trial would be more convenient in Mexico,[108] the only public factor that weighed in favor of dismissal was that the courts in Mexico would also have an interest in having the controversy decided in their own courts. In view of the public and private factors presented, both district court judges did not abuse their discretion in refusing to dismiss this case based on *forum non conveniens*. No further consideration is necessary or appropriate, and thus review should be denied. *See* S. Ct. R. 10.

Petitioner's argument that the holding of one or two courts justifies a dismissal is unsubstantiated because "each case turns on its facts." *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946). The cases offered by Petitioner as support for its argument that the District Courts erred contain key differences from this case. In *Canada Malting*,[109] all of the material

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[105] 1S USCA5 2361.

[106] 1S USCA5 2362.

[107] 1S USCA5 2362.

[108] OR 1145, 2024-25.

[109] *Canada Malting Co.*, 285 U.S. 413 at 423.

witnesses were residents of Canada. In this case, key damages witnesses, including Petitioner's, are United States residents. Individuals who inspected the vessels following the allision are United States residents. *Saqui*[110] is also dissimilar in several important aspects: none of the witnesses appeared to reside in the United States and none of the documents had been translated.

2. The Fifth Circuit Properly Found That There Was no Abuse of Discretion

Given the incentives that press the district courts to reduce their caseload, an appellate court "should take particular care before second-guessing a district court that rejects a *forum non conveniens* motion after considering the factors that [it] and the Supreme Court have deemed relevant." *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225 (3d Cir. 1995) (upholding the district court's refusal to deny a motion to dismiss based on *forum non conveniens* in a suit by Indian nationals against an Indian shipping company and vessel arising from injury to a crew member's child aboard the vessel in international waters.) The Fifth Circuit applied the appropriate standard of review, properly analyzed the District Courts' orders and based on the evidence submitted to the District Courts, found that no abuse of discretion had occurred.

It is of no moment that the Fifth Circuit may not have reached the same conclusion under *de novo* review. The Fifth Circuit's duty, as an appellate court reviewing a district court's *forum non conveniens*

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[110] *Saqui v. Pride Cent. Am., LLC.*, 595 F.3d 206 (5th Cir. 2006).

decision, is to analyze whether the District Courts abused their discretion. "Unlike issues of jurisdiction, determinations of *forum non conveniens* are not pure questions of law; rather they represent exercises of structured discretion by trial judges appraising the practical inconveniences posed to the litigants and to the court should a particular action be litigated in one forum rather than another." *Pain v. United Techs. Corp.*, 637 F.2d 775,781 (D.C. Cir. 1980). Appellate review, therefore, is solely to determine whether there has been an abuse of discretion. *Id.* at 779 (footnotes omitted). *See also, e.g.*, *Gulf Oil Corp.*, 330 U.S. at 508; *Koster v. Lumbermens Mut. Co.*, 330 U.S. 518 (1947).

An abuse of discretion may occur when the district court fails to consider one or more of the important private or public interest factors; does not hold the defendants to their burden of persuasion on all elements of the *forum non conveniens* analysis; or has clearly erred in weighing the factors the court must consider. *Reid-Walen v. Hansen*, 933 F.2d 1390 (8th Cir. 1991) (quoting *Lacey*, 862 F.2d at 43); *See also Fidelity Bank PLC v. N. Fox Shipping N.V.*, 242 Fed.Appx. 84, 91 (4th Cir. 2007). As the Fifth Circuit confirmed, none of these failures occurred in this case.

On appeal to the Fifth Circuit, Petitioner did not contest the adequacy of the procedural framework supporting the District Courts' orders, or point to a single factor that Judge Kent failed to consider in conducting the *forum non conveniens* analysis, nor indicate any issue Judge Ellison failed to consider in declining to reconsider the motion to dismiss. Instead, and as the Petition illustrates, Petitioner simply reiterated its old arguments and created new ones in support of granting the dismissal based on *forum non*

conveniens. The Fifth Circuit considered whether the District Courts failed to weigh all relevant factors and whether its analysis of the facts was reasonable and properly found no abuse of discretion.

Petitioner now argues for the first time that Judge Kent's analysis was defective on its face because the order allegedly contained conclusory statements. This alleged defect was not timely raised before the Fifth Circuit and consequently was not considered. Therefore, this argument has been waived since Petitioner is making this argument for the first time before this Court. Even assuming such an argument were properly made before the Fifth Circuit, Petitioner is incorrect: reading the order in conjunction with the evidence presented by Respondents (and delineated above), it is clear that the statements are not conclusory. In their response to the motion to dismiss, Respondents listed every key document that had been translated, listed the name and employer of every witness amenable to the district court and stated how many miles Petitioner would have to travel if this case were tried in Mexico or Galveston, Texas. Contrary to Petitioner's claim, it is not necessary for an order to cite to the briefs. *See e.g. In re Air Crash Disaster*, 821 F.2d at 1166 fn 32 ("the district court should explain its decision-making process clearly and in sufficient detail to permit us to review it...").

Likewise, the Fifth Circuit properly held, in ruling on MarMex's motions for reconsideration of the motion to dismiss based on *forum non conveniens*, that Judge Ellison properly considered new evidence that was developed after the motion to dismiss was denied, which also warranted maintenance of this action in the United States. *See e.g. O'Keefe v. Noble Drilling Corp.*,

347 Fed.Appx. 27 (5th Cir. 2009) (upholding Judge Harmon's decision to reconsider a motion to dismiss that was previously denied by Judge Kent based on evidence that was either not presented to, not considered by, or otherwise not available to Judge Kent). Indeed, the purpose of a motion for reconsideration is to present the judge with new law or new evidence previously unavailable. Petitioner cannot seriously claim to have been treated unfairly when in response to its motions to reconsider, Respondents presented Judge Ellison with all the evidence it obtained as a result of its motions to compel.

Contrary to Petitioner's assertion, current law does not require a court to determine whether foreign law would apply to a general maritime case prior to analyzing the public/private factors.[11] *See e.g. Piper Aircraft Co.*, 454 U.S. 235 (holding that the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* analysis); *In re Air Crash Disaster*, 821 F.2d at 1163 (en banc) (expressly rejecting and disapproving of a modified analysis of *forum non conveniens* that requires an analysis into choice of law prior to balancing the private and public

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[11] Some circuits do require a modified *forum non conveniens* analysis that first looks into whether United States law governs the actions but only for Jones Act actions. This case was never filed pursuant to the Jones Act. *See e.g. Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656 (9th Cir. 2009)(noting that the purpose of a choice of law inquiry in a *forum non conveniens* analysis is to determine if the Jones Act, with its special provisions mandating venue in the United States district courts, would apply).

factors); *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2d Cir. 1983) (pointing out that a choice of law determination is not involved in a *forum non conveniens* analysis). Significantly, Petitioner filed a bare-bones notice asserting that Mexican law should apply one day before the district court issued its decision on the motion to dismiss.[12] Moreover, Petitioner's motion to dismiss contained only a general and conclusory statement that Mexican law "should" apply to the case.

The occurrence and completion of a trial is a factor to be considered and may bolster the decision to deny the motion to dismiss. *See e.g. In re Air Crash Disaster*, 821 F.2d at 1167-8 (en banc) ("Unless the defendant can show that he was greatly prejudiced by the fact that the trial occurred in the particular forum selected by the plaintiff, we believe the trial's occurrence and completion bolsters the district court's original decision to deny the motion to dismiss); *Lony v. E.I. Dupont de Nemours & Co.*, 935 F.2d 604, 614 (3d Cir. 1991). ("[W]henever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal... greatly increases.") As was usual and customary, the Fifth Circuit clearly considered that this case has been ongoing for more than four years. Significantly, liability has already been found against Petitioner. All that remains of this dispute is a determination of the quantum of damages which will not take more than a day and a half to try to the bench.

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[12] OR USCA5 1996; 1S USCA5 90.

3. *De Novo* Review of *Forum Non Conveniens* is Unwarranted

Petitioner seeks to carelessly cast aside a well accepted standard of review for yet another attempt to reverse the lower courts' findings because it is unhappy with the results. There is no spilt in the circuits on this issue, and Petitioner cannot cite a single case that mandates *de novo* review of a motion to dismiss based on *forum non conveniens*. *Piper Aircraft* clearly held, "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion." *Piper Aircraft Co*, 454 U.S. at 257. In *Piper Aircraft*, this Court reversed and reinstated the district court's decision because "the Court of Appeals seem[ed] to have lost sight of this rule, and substituted its own judgment for that of the District Court." *Id.* Other circuits have regularly applied this rule of limited appellate review. *See e.g., Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944, 951 (1st Cir. 1991) (Breyer, C.J.) (district court's determination "may be reversed only where there has been a clear abuse of discretion") (quoting *Piper Aircraft Co.*, 454 U.S. at 254); *Accord SSI Corp. v. Matsuda*, 175 Fed.Appx. 168, 169 (9th Cir. 2006) ("We review the district court's dismissal narrowly for a clear abuse of discretion."); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir. 2001) ("We review a dismissal based on *forum non conveniens* only for abuse of discretion.").

The current standard of review for *forum non conveniens* has been effectively functioning for over sixty years and should not be disturbed. While a district court has broad discretion in deciding whether

to dismiss an action on grounds of *forum non conveniens*, a court's discretion is not so broad as to preclude meaningful appellate review of its decisions. As explained by the Second Circuit:

> Although the Supreme Court has emphasized the broad discretion of the district courts in deciding whether to dismiss on the basis of *forum non conveniens*, there would be little purpose in Congress giving this Court a power of review if it were not a meaningful one. A meaningful power of review is the right to determine whether the district court reached an erroneous conclusion on either the facts or the law.

Irish Nat'l Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 92 (2d Cir. 1984) (citations omitted); *see also Reid-Walen*, 933 F.2d at 1394.

Policy considerations such as judicial economy and balance of power are best served through the implementation of an abuse of discretion standard of review. If a *de novo* review standard were implemented for all *forum non conveniens* motions, litigants who were unhappy with the outcome, such as Petitioner, would engage in perpetual review. As explained by this Court, "[p]erpetual litigation of any issue – jurisdictional or non jurisdictional – delays, and therefore threatens to deny, justice." *Christianson v. Colt Indus. Operating Group*, 486 U.S. 800, 816 (1988) (internal citations and quotations omitted).

Since the case was filed in 2004, Respondents have incurred significant costs in preparing the entire case for trial and in defending against Petitioner's

unnecessary "perpetual litigation" of the *forum non conveniens* issue. The parties have engaged in extensive discovery since Judge Kent's ruling in July 2006 and have already obtained a liability finding against Petitioner. The Court should deny the Petition; otherwise it would result in extreme injustice to Respondents and threaten to further delay the last phase of trial of this matter.

CONCLUSION

Petitioner has failed to show a proper legal basis under Supreme Court Rule 10 for its Petition to be granted. The District Courts' decisions denying Petitioner's motion to dismiss were warranted, correct and proper. Likewise, the Fifth Circuit's opinions are not contradictory to the precedent of this Court or any other appellate courts. Therefore, the Petition for Writ of Certiorari should be denied

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